benchtv
a benchmark production

Précis Paper

Applications to Remove Liquidators

Discussion includes – power to remove liquidators – liquidators' approaches to their tasks – seeking advice from the court – adversarial methods of recovery – what is evidence of ownership of vehicles?

Discussion Includes

- What has to be shown in order to have a liquidator removed?
- Are liquidators entitled to take a robust and commercial approach to their task?
- Is it necessary for liquidators to seek the advice of the Court whenever they have any doubt about the way they are proceeding?
- Does an adversarial approach taken by a liquidator to persons who have been involved in running the company necessarily constitute misconduct?
- Does vehicle registration in NSW provide evidence as to ownership of the vehicle?

Précis Paper

Applications to Remove Liquidators

1. In this edition of BenchTV, Erik Young (Barrister) and Terry Sperber (Solicitor) discuss the New South Wales Supreme Court's (Bergin CJ) decision in *Minh Tan Tran v Nicols* [2015] NSWSC 1635 which involved an application by the directors of a company seeking to remove a liquidator who had been previously appointed to that company. Mr Young and Mr Sperber acted for the successful respondent, Nicols, in the Supreme Court.

2. Ultimately, the application failed and the Court held that it would not be appropriate for the liquidator to be removed.

Background to *Minh Tan Tran v Nicols* [2015] NSWSC 1635

3. In February 2015, the Tax Office issued and served a statutory demand on a company, T&T Air Conditioning Pty Ltd, seeking payment of taxation liabilities which the company had not met. There was no application to set aside the statutory demand and in April 2015 the Tax Office applied to have the company wound up in the Supreme Court of NSW.

4. On the 28th of May 2015, the Supreme Court gave orders winding up the company and appointing a liquidator (Nicols).

5. The liquidator, as required of him, gathered all available documents to him and sought to investigate the affairs of the company. Early on, it became apparent to the liquidator that there were a number of vehicles which the company had owned at a time prior to the appointment of the liquidator that were no longer in the possession of the company. The liquidator identified that two of those vehicles were presently held by another 'new' company which had common directorships, shareholders and a very similar-sounding name. The liquidator started correspondence with that new company to try and ascertain what the position was with the vehicles and ultimately contended that the vehicles still belonged to the company he was appointed over.

6. The liquidator also discovered that three days prior to his appointment, on the 5th of May, there were registration changes to those two vehicles. The registration document showed that someone had changed the name of the company that the vehicles were registered to, from the company T&T Air Conditioning Pty Ltd to the new related company.

7. Section 64 of the *Road Transport Act 2013* (NSW) provides that merely changing the registration of vehicles does not provide evidence of a transfer of title. In the correspondence that ensued, the liquidator was met by representatives of the new company that was holding

the vehicles. They contended that in fact there had been a proper transfer of title to the new company and that in fact the vehicles no longer belonged to the company in liquidation.

8. The liquidator asked for corroboration and after a period of time the liquidator formed the view that the documents did not substantiate the claim that the vehicles were properly transferred.

9. The liquidator made a decision to repossess the vehicles, which he believed he was entitled to do because in fact they belonged to the company that he was the liquidator of. The liquidator's role under the *Corporations Act 2001* (Cth) is to recover the assets of the company and to distribute those assets to the creditors. The liquidator proceeded to repossess the vehicles and the vehicles were delivered into the possession of the liquidator.

10. After the vehicles were repossessed, representatives of the new company took the view that the liquidator had not acted appropriately and after some exchanges of correspondence made an application to the Supreme Court of NSW seeking orders, effectively, that the liquidator return the vehicles to the new company.

11. In addition, the new company also made a second complaint that the liquidator had received and banked a cheque, addressed to the company in liquidation, into the company in liquidation's bank account, when it actually belonged to the new company because it was the new company which had performed the work. This was also the subject of correspondence between the parties. The liquidator took the view that because the new company had not been able to substantiate yet that the amount paid belonged to it, he was not prepared to transfer the funds in respect of that cheque to the new company.

12. Subsequent to the first return date, the parties started negotiating with the view to resolving the issues between them. The parties decided that it would be appropriate that the matter be resolved in a way which would allow a final determination of all the issues to take place in due course, but for the vehicles to be returned to the new company subject to an injunction restraining the new company from disposing of the vehicles.

13. Subsequent to that, an originating process was received by the solicitors for the liquidator, Young and Sperber, seeking orders under s 473(1) of the *Corporations Act* that the liquidator be effectively removed. Accompanying that application was an affidavit which identified the way in which the liquidator had repossessed the vehicles and also the fact that the liquidator had not returned the funds as the principle bases for which the liquidator be removed.

<u>What is Required in order to Remove a Liquidator?</u>

14. The applicants relied upon s 473(1) of the *Corporations Act* which provides that a liquidator appointed by the Court may resign or, *on cause shown*, be removed by the Court. Mr Sperber

notes that the provision is quite short and general in nature which has prompted a number of decisions over the years that have helped practitioners to understand what would entitle an applicant to successfully remove a liquidator.

15. "Cause" can relate to anything ranging from the conduct of the liquidator to the pace of the liquidation. According the Mr Young, it really relates to the circumstances in which the liquidation is being conducted and whether or not it is in the best interests of the liquidation for the liquidator to be the liquidator. For example, it might be the case that it is not appropriate for the liquidator to continue, for no fault of their own, but because the liquidator has fallen ill or something of that nature. In that instance, it would not be in the best interests of the liquidation that the liquidator remain as it would cause delay to the creditors and the overall liquidation. The test is quite broad in its practical application.

16. A wide range of conduct has been canvassed in case law which can lead to a liquidator being removed, if that conduct is found to show cause sufficient for the court to find it in the best interests of the liquidation to remove the liquidator. This conduct has included trespass, bias towards particular creditors, or being too close to certain interests.

NSW Supreme Court Proceedings

17. Her Honour, Chief Justice Bergin, facilitated the dispute between the parties by agreeing to have the matter heard at very short notice. The matter was heard over two days.

18. In this case, the allegations made were of quite a serious nature. The first allegation was that the liquidator had committed trespass by way of arranging for the two vehicles that were repossessed to be repossessed. This allegation failed because there was no evidence that indicated this was the case. The second allegation was that the liquidator converted a cheque that was alleged to be the property of the new company. It was found that there was no basis for that allegation to be made whatsoever. During the course of the arguments, the complaint of the liquidator having banked the cheque in the first place was in fact withdrawn and the complaint then changed into a compliant of a failure to pass on the funds. There was found to be no basis for an allegation of conversion to be made.

19. Mr Young notes that it is important when making allegations of a very serious nature to apply the "Brigenshaw standard" from *Briginshaw v Briginshaw* (1938) 60 CLR 336, which effects the evidentiary standard by which a court has to be satisfied in order to find the allegations proven.

20. After analyzing the facts and before making a determination based on those facts and the conduct, her Honour dealt with a submission made by the applicants during the course of the hearing that it was inappropriate for the liquidator to have acted in the way he did without first having sought the direction of the court under s 479(3) of the *Corporations Act*.

SECTION 479:

Exercise and control of liquidator's powers

...

(3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

21. Her Honour dismissed that submission as being one that would ground the basis of a removal. There were a number of reasons for her finding this. At the core of them is the principle that a liquidator has an obligation to act commercially and robustly in the conduct of a liquidator's duties. It is not for a liquidator to go 'running up' to a court every time they want to take any step, simply because there are possible questions or doubts that the liquidator has. Mr Young notes that there is no formula for determining whether or not an action is necessary in any particular circumstance. Each circumstance has to be considered in its own light and on its own merits. Most importantly, there is a very high need for commerciality in the way that a liquidator conducts the liquidation and that involves questions of cost and delay, which are primary considerations for a liquidator. In this case, the court rejected the applicant's submissions in that regard because it was found that the liquidator acted perfectly sensibly, commercially and reasonably in taking the actions that he did.

22. Her Honour went on to deal with the principle factual issues which were the alleged trespass and conversion of the cheque and found that, under the factual circumstances of the case, none of those founded a basis for removal, accepting Mr Young's submissions on both those issues. Effectively, My Young's submissions were that the applicants had not made out their case either factually or legally. It was a case in which there was a wide range of allegations initially made of various seriousness which were slowly detracted from, dropped or altered in some way so as to refine them as the case went along. As it came to final submissions it was quite apparent to Mr Young that there was simply not enough evidence to support any allegation of trespass being made nor any allegation of conversion. The criticisms that were peripheral to those facts, in relation to the conduct of the liquidator not first seeking directions from the court or not first putting the director's on notice of his intention to repossess the vehicles, were ultimately found to have no substance and were not sufficient to warrant the liquidator's removal.

23. Two of the principle cases which the Respondent relied upon as authority in order to repel the application were *St Gregory's Armenian School (in liq)* [2012] NSWSC 1215; 92 ACSR 588 (Brereton J) and *SingTel Optus Pty Ltd v Weston* [2012] NSWSC 674; 90 ACSR 225.

Discussion of the Conduct of the Liquidator

24. Overall, the case was a resounding success for the liquidator and there was no finding that there was anything which the liquidator had done that founded the basis for him to be removed. However, throughout the course of the correspondence with the other side and in the judgement itself, one question that still remained unresolved was the question of whether or not the liquidator had acted in a supposed 'best practice' in repossessing the vehicles in the first instance. While the court found that it was not a basis for his removal and he wasn't required to get directions before he did so, perhaps he ought to have applied to the court for orders that the vehicle be repossessed or not acted as hastily as he did.

25. In the primary judgement there was a hypothetical posed by her Honour, Chief Justice Bergin, that, with the possibility of hindsight, it may have been prudent for the liquidator to have first informed the directors of his intention to repossess the vehicles before he in fact did so. However, Mr Young says it is very important to read that comment in light of the subsequent decision which dealt with the question of costs. In *Minh Tan Tran v Nicols (Costs)* [2015] NSWSC 1735, her Honour deals with a submission made by the directors which sought to make mileage of that hypothetical situation put by her Honour in the substantive decision. In the subsequent costs decision, her Honour deals with it by indicating that she was simply indicating what might have been the case, with the benefit of hindsight, but makes clear that it was not necessarily the case that it would have been more sensible or better practice for the liquidator to put the directors on notice before he repossessed the vehicles. It is worth bearing in mind that liquidators often have to act swiftly and vigorously in the face of significant opposition put by directors or third parties who may have the possession of certain company assets. Thus, it is not a criticism of the liquidator at all that he acted in the way that he did. When both judgments are read together one sees a fairly comprehensive vindication of the conduct of the liquidator in this case. This likely gives liquidators some comfort in making decisive commercial decisions.

26. It is important to remember that in this case, there was a history where the directors had removed funds from the bank account of the company which was in liquidation and had changed the registration of the vehicles from the name of the company in liquidation into the name of the new company a mere three days before the court appointed the liquidator. Thus, there was context to the liquidator taking his actions, which was very important in the outcome and comments made by the court in relation to the conduct of the liquidator at the time.

27. Support for this position can be found in the judgment of *St Gregory's Armenian School (in liq)* at [32]:

> *Courts expect liquidators to make commercial judgments and to act commercially, and to pursue vigorously the interests of the company. Liquidators have a private interest apart from the public good - not their own personal interest, but that of the creditors or contributories.*

28. Mr Sperber notes that he always asks himself that if he was a creditor and he had lent money to the company, and the only hope that he had of getting the money back was if the liquidator was able to seize some assets from people who had displayed potential to dissipate assets, as a creditor he would certainly not want the liquidator to be tipping off those individuals that he was coming around to take the assets. Instead, he would want the liquidator to repossess those assets, if the liquidator felt there was a sound commercial basis for repossessing them, in order to give himself the best opportunity to bring in the assets of the company which he could then sell and pay out to the creditors. This provides a strong argument that what the liquidator did was in sound commercial judgement in the circumstances.

Significance of the Change in Registration of the Vehicles

29. One of the principle justifications for the criticism of the liquidator was that the vehicles were repossessed not withstanding the fact that the registration certificates recorded the new company as the registered holder of those vehicles. The liquidator did not consider that by itself a sufficient basis to relinquish his claim over those vehicles. That criticism was alleged by the directors but was ultimately rejected and found baseless under s 64 of the *Road Transport Act 2013* (NSW), which expressly states that the register of vehicles provides no evidence whatsoever of the ownership of the vehicles specified on the register. Registration does not provide any evidence of ownership, it is simply a record of the name of the registered person who has the vehicle.

Costs Order - *Minh Tan Tran v Nicols (Costs)* [2015] NSWSC 1735

30. Her Honour did not make a costs order in the judgment but directed the parties to agree on a costs order independently or send submissions in to her Honour on that particular question. Submissions were made by the respondent that the liquidator should have his costs assessed on an indemnity basis because the very premise upon which the application had been brought had been found to have no basis to it whatsoever and that the remaining allegations were dismissed for having no foundation. Her Honour awarded the liquidator indemnity costs to the extent of 65% from the very commencement of the proceedings. Mr Young notes that this was a very significant cost order because in addition to the 65% indemnity costs order, the liquidator was also entitled to ordinary costs in relation to the remaining 35%.

Implications

31. The courts are not prepared to entertain the removal of a liquidator merely because there were hostilities or disputes between parties and the liquidator. The courts accept and probably expect that there will be adversarial approaches taken by the liquidator against parties who have had some interest in the liquidation in the past.

BIOGRAPHY

Erik Young

Erik Young was admitted as a Lawyer in 1998 before being called to the NSW Bar in 2005. He has previously presented for UNSW on demarcation disputes, award/agreement coverage & the bargaining agency beyond eligibility rule.

Terry Sperber

Terry Sperber was admitted as a Lawyer in NSW in 1994. He is partner at Swaab Attorneys, primarily practicing in the areas of property, construction, manufacturing, retail, entertainment and financial services.

BIBLIOGRAPHY

Focus Case

Minh Tan Tran v Nicols [2015] NSWSC 1635

Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_24-11-2015_insurance.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/564e4153e4b0eaaf45aefb59

Cases

Briginshaw v Briginshaw (1938) 60 CLR 33
St Gregory's Armenian School (in liq) [2012] NSWSC 1215; 92 ACSR 588
SingTel Optus Pty Ltd v Weston [2012] NSWSC 674; 90 ACSR 225
Minh Tan Tran v Nicols (Costs) [2015] NSWSC 1735

Legislation

Road Transport Act 2013 (NSW)
Corporations Act 2001 (Cth)